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No. 90-1688

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY and POTOMAC GREENS ASSOCIATES PARTNERSHIP,

Petitioners,

v.

DAINGERFIELD ISLAND PROTECTIVE SOCIETY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

THOMAS F. FARRELL, II
(Counsel of Record)
JOHN S. STUMP
AMY T. HOLT
McGUIRE, WOODS, BATTLE
& BOOTHE
1199 North Fairfax Street
Post Office Box 25047
Alexandria, Virginia 22313-5047
(703) 739-6200

Date: May 3, 1991

Counsel for Petitioners

Appellate Printing Services • 523 East Main Street • Richmond, VA 23219 • (800) 642-7789

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QUESTION PRESENTED

1. Does a unique laches doctrine apply to cases brought to attack and unsettle actions by the Federal government that does not consider the occurrence of harm done defendant by plaintiff's unreasonable, unexcused delay in asserting claims to be the determining factor; but, rather, allows such cases to proceed so long as the plaintiff may still gain some benefit if the laches be ignored.

LIST OF PARTIES

The parties to the proceedings below were:

1. Daingerfield Island Protective Society

2. Kenneth Williams

3. Ellen Pickering

4. Jean Caldwell

5. Save the George Washington Parkway

6. Northeast Citizens Association

7. Secretary, U.S. Department of the Interior (formerly Donald P. Hodel; presently Manuel Lujan, Jr.)

8. Assistant Secretary, U.S. Department of the Interior (formerly William P. Horn; presently Constance B. Harriman)

9. Director, National Park Service (formerly William Penn Mott, Jr.; presently James M. Ridenour)

10. Regional Director, National Capital Region, National Park Service (formerly Manus J. Fish, Jr.; presently Robert Stanton)

11. The National Capital Planning Commission

12. Richmond, Fredericksburg & Potomac Railroad Company is a wholly-owned subsidiary of RF&P

Corporation ("RF&P"). RF&P is controlled by CSX Corporation through its ownership of CSX Transportation, Inc., which controls the Richmond-Washington Company, which in turn owns approximately 60% of the voting stock of RF&P.

13. Potomac Greens Associates Partnership ("the Partnership"). The Partnership is a joint venture comprised of RF&P Development, Inc. and S/F Potomac Greens, Inc. RF&P Development, Inc. is a wholly-owned subsidiary of RF&P Properties, Inc., which is a wholly-owned subsidiary of RF&P Corporation. S/F Potomac Greens, Inc. is a privately-owned corporation.

14. The City of Alexandria appeared as an "amicus curiae" in the District Court.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

RICHMOND, FREDERICKSBURG & POTOMAC
RAILROAD COMPANY and
POTOMAC GREENS ASSOCIATES PARTNERSHIP,

Petitioners,

v.

DAINGERFIELD ISLAND PROTECTIVE SOCIETY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The District Court barred prosecution of this case because the plaintiffs, Daingerfield Island Protective Society, et al. ("DIPS"), delayed bringing it for an unreasonable and inexcusable period of sixteen years. The Court of Appeals agreed that DIPS had failed to act for an unreasonable period, but held that the delay would not bar prosecution of DIPS' claims, regardless of the harm caused by the delay, if the objectives DIPS sought continued to be

achievable. This decision is an unprecedented and improper refusal to apply the doctrine of laches and constitutes a dangerous invitation to citizen groups to paralyze Federal action by guerilla tactics.

Accordingly, Richmond, Fredericksburg & Potomac Railroad Company ("RF&P") and Potomac Greens Associates Partnership ("Potomac Greens"),[1] respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia is reported at 710 F. Supp. 368 (D.D.C. 1989) and is reprinted in Appendix A, hereto, 1a - 22a. The order of the United States Court of Appeals for the District of Columbia Circuit summarily affirming the District Court's order with respect to dismissal of DIPS' National Environmental Policy Act ("NEPA") claims, is reprinted in Appendix B, hereto 22a-23a. The opinion of the Court of Appeals reversing the District Court's laches ruling and remanding the case to the District Court is reported at 920 F.2d 32 and is reprinted in Appendix C, hereto, 24a-43a. The Court of Appeals' January 30, 1991 order denying Intervenors' Suggestion for Rehearing En Banc is reprinted in Appendix D, hereto 44a-45a. The Court of Appeals' February 4, 1991 order denying Intervenors' Petition for Rehearing is reprinted in Appendix E, hereto 46a-47a.

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[1]RF&P and Potomac Greens are referred to collectively as the Intervenors.

JURISDICTION

The District Court's jurisdiction was based upon 28 U.S.C. § 1331. The District Court awarded Intervenors and the Government (collectively the "Defendants") summary judgment on DIPS' challenge to a 1970 land Exchange Agreement, finding it barred by laches.[2]

The Court of Appeals reversed the District Court's laches ruling. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

There are no statutes directly involved in this case because it concerns the proper standard for the application of the equitable doctrine of laches, which has not been codified.

STATEMENT OF THE CASE

A. Nature of the Case.

In 1970, the United States and the Intervenors entered into an Exchange Agreement, pursuant to which the United States granted to Fairchild & Company ("Fairchild") an easement from the George Washington Memorial

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[2]The District Court also found that the Continuing Appropriations Act of 1987 mooted DIPS' remaining challenges to approval of the interchange design. The Court of Appeals vacated these findings and remanded the case to the District Court for further proceedings. Petitioners do not seek a writ of certiorari with respect to that portion of the Court of Appeals' opinion.

Parkway, and the right to construct an interchange (subject only to limited design approval), into a tract Fairchild had leased from RF&P located adjacent to RF&P's Potomac Yards. In exchange, the United States received 28.8 acres of Dyke's Marsh -- an endangered wetland -- then owned by Mr. and Mrs. Fairchild. RF&P is the successor in interest to Fairchild.

After a delay of sixteen years and after the property's owners and developers had expended millions of dollars, DIPS brought this suit seeking to set aside the Exchange Agreement upon the ground that that 1970 action might have a detrimental effect upon traffic patterns in 1990 and beyond.

The District Court and the Court of Appeals both held that DIPS' sixteen-year delay in filing suit was unreasonable and inexcusable. *Daingerfield Island Protective Soc'y v. Hodel*, 710 F. Supp. 368, 374 (D.D.C. 1989); *Daingerfield Island Protective Soc'y v. Lujan*, 920 F.2d 32, 38 (D.C. Cir. 1990). Where the Court of Appeals diverged from the trial court, and erred, was in applying the prejudice element of the laches doctrine. For centuries, case law has held that in determining whether laches bars litigation a court examines whether the delay in filing suit has caused harm to the defendant. The Court of Appeals abandoned this standard here, holding that the material inquiry was *not* damage to the defendants, but whether the plaintiffs may still gain some benefit if allowed to proceed despite their inexcusable delay. *See* 920 F.2d at 40.

B. Procedural Background.

On August 27, 1986, DIPS filed a Complaint asserting for the first time the instant challenge to the 1970 Exchange Agreement. The District Court dismissed the

Complaint, granting summary judgment to Potomac Greens and the Government, finding that (1) DIPS' unreasonable and inexcusable sixteen-year delay in asserting its challenge to the Exchange Agreement barred its claims and (2) DIPS' remaining claims were rendered moot by the Continuing Appropriations Act of 1987, which required the Government to prepare an environmental impact statement on the land exchange and traffic interchange design. *Daingerfield Island Protective Soc'y v. Hodel*, 710 F. Supp. 368.

The Court of Appeals affirmed the District Court's dismissal of DIPS' NEPA claims, but reversed the District Court's laches ruling. To this reversal, certiorari is sought.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CREATES A SPLIT OF LAW AMONG THE CIRCUITS

The decision of the Court of Appeals casts doubt upon the proper standard for the application of laches throughout the nation and creates a split of decisions among the several Courts of Appeal.

Before the decision by the District of Columbia Court of Appeals in this case, the Courts of Appeal had uniformly held that whether laches bars a claim depends upon: (1) the length of the plaintiff's delay in instituting suit; (2) whether the delay was unreasonable; and (3) the prejudice to the defendants caused by the delay. This Court of Appeals' decision, if left standing, will create a conflict among the circuits and, as well, danger of litigation attacking decisions of the United States' Government long considered final.

The panel below affirmed both the District Court's findings that DIPS' sixteen-year delay in filing suit was far too long, and that that delay was inexcusable. Although the Court of Appeals also recognized the prejudice to the Intervenors resulting from the delay, it nonetheless reversed the District Court's laches ruling solely on the basis of its conclusion that the plaintiffs may still gain some benefit if allowed to proceed despite their lengthy, inexcusable delay. *See Daingerfield Island Protective Soc'y v. Lujan*, 920 F.2d at 40.

The Court of Appeals relied on no precedent to support this revolutionary "gain to plaintiffs" distortion of the law of laches. Moreover its analysis creates an ambiguity regarding the proper legal standard for the application of laches and conflicts with decisions of the other several Courts of Appeal who have examined the question. *See, e.g., White v. Daniel*, 909 F.2d 99 (4th Cir. 1990); *Park County Resource Council, Inc. v. United States Dep't of Agriculture*, 817 F.2d 609 (10th Cir. 1987); *Citizens and Landowners Against the Miles City/New Underwood Powerline v. United States Dep't of Energy*, 683 F.2d 1171 (8th Cir. 1982).

In *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990), the Fourth Circuit noted that in determining the applicability of a laches bar, the plaintiff's delay must be balanced against the prejudice to the defendant. The Fourth Circuit explained the proper relationship of the factors, stating that the defendant "'is aided by the inference of prejudice warranted by the plaintiff's delay,' [and] the greater the delay, the less prejudice required to show laches." 909 F.2d at 102.

The Tenth Circuit also articulated the proper standard for application of the laches doctrine in *Park County*

Resource Council, Inc. v. United States Dep't of Agriculture, 817 F.2d 609 (10th Cir. 1987). There, the court stated simply:

> An environmental action may be barred by the equitable defense of laches if (1) there has been unreasonable delay in bringing suit, and (2) the party asserting the defense has been prejudiced by the delay.

817 F.2d at 617.

In *Citizens and Landowners Against the Miles City/New Underwood Powerline,* the Eighth Circuit noted that:

> In determining whether the doctrine of laches should bar a lawsuit, all the particular circumstances of each case must be considered, including the length of delay, the reasons for it, its effect on the defendant, and the overall fairness of permitting the plaintiff to assert his or her action. (Citations omitted.)
>
> * * *
>
> . . . [W]e agree with the district court that the appellants' delay in seeking relief has unduly prejudiced the appellees. As a result of the delay, the defendants have committed substantial resources that they may not have if the appellants had acted in a timely manner to obtain the relief they now seek. (Citation omitted). Accordingly, because the delay in commencing suit was unreasonable, inexcusable and unduly prejudicial to the appellees, the

> court below properly found that laches bars the claims . . . .

683 F.2d at 1177.

Each of these decisions demonstrates that whether laches bars a claim depends *only* upon the length of the plaintiffs' delay; whether that delay was unreasonable; and the resulting prejudice to the defendants. Potential benefit to the plaintiffs has never before been considered relevant -- let alone sufficient to override concurrence of unreasonable delay and prejudice to defendants -- until the Court of Appeals' decision in this case.

This flawed decision is a potentially pernicious precedent for all who must rely on finality of actions left unchallenged. The Court of Appeals panel expressly concurred in the trial court finding that DIPS had waited far too long to file suit and that DIPS' delay was plainly unreasonable. Yet, the court's decision would permit a twenty-year old agreement to be challenged because the *plaintiff* -- whose unreasonable delay caused the prejudice -- may potentially still achieve an objective. The logical result of such a rule is that no matter how long one waits -- regardless of the harm to the defendant, public bodies or private parties -- so long as a goal is still obtainable -- laches will be no bar. Indeed, the decision below will be relied upon to attack federal actions that have long been thought by everyone to be laches-barred. The decision could well create chaos because it permits a previously unknown exception to the laches rule to swallow the doctrine whole.

II. RF&P AND POTOMAC GREENS COULD BE IRREPARABLY PREJUDICED IF THE EXCHANGE AGREEMENT IS NOW NULLIFIED MORE THAN TWO DECADES AFTER ITS EXECUTION

A. The Prejudice to the Intervenors Was Greatly Enhanced by DIPS' Twenty Year Delay.

Even a cursory statement of the circumstances of this case makes apparent the inequity of the Court of Appeals' decision.

DIPS seeks to prevent the defendants from implementing the 1971 agreement whereby Intervenors' predecessor secured an easement for an interchange with the George Washington Memorial Parkway in exchange for deeding Dyke's Marsh to the United States.

Relying upon that 1971 decision, Intervenors have expended tremendous sums of money and incalculable time and energy over the past twenty years. In addition, Dyke's Marsh, developable in 1971, is no longer developable. Thus Intervenors cannot be restored to the status *quo ante*. In addition, should DIPS succeed in the litigation the Court of Appeals refused to bar, development potential far in excess of the expenditures to date or even the value of Dyke's Marsh will be irretrievably lost -- indeed that is the entire purpose of DIPS' Complaint.

Both of the first two threatened harms to Intervenors would be solely consequent upon delay of decision of DIPS' case from 1971 until the 1990's.

B. The Federal Action That DIPS Seeks to Challenge Is No Longer Open to Revision.

Nevertheless, the Court of Appeals concluded that because "no construction has begun on the interchange or on the Potomac Greens complex; the damage that plaintiffs sought to prevent thus has not begun to occur." *Daingerfield Island Protective Soc'y,* 920 F.2d at 40. This finding, even under the Court of Appeals' application of the laches doctrine, is flawed. The alleged "harm" which DIPS seeks to prevent is the deeding to RF&P of the easement from the Parkway into the Potomac Greens site. That act occurred in 1981 and can no longer be set aside.

The effectiveness of that grant of easement is the only "harm" DIPS could seek to prevent because Potomac Greens is *not* a Federal project. DIPS can challenge only NPS' actions -- not those of RF&P. Thus, the "harm" DIPS seeks to prevent is NPS' granting of access rights to the Intervenors -- rights, which irrevocably vested in 1971 when Fairchild deeded his 28.8 acres of Dyke's Marsh to the United States.

For this reason, the fact that construction has not begun on the Potomac Greens site, a factor which the Court of Appeals found critical, is immaterial. The pertinent inquiry is not whether construction has commenced; but rather, "what agency decisions are yet to be made, and what decisions, although already made, remain open to revision." *See Jones v. Lynn,* 477 F.2d 885, 890 (1st Cir. 1973). Here, none is.

The Court of Appeals' decision ignored the fact that the Exchange Agreement was fully implemented in 1971, when NPS made its commitment to the Intervenors to grant them access rights from the Parkway to the Potomac

Greens site. A deed for that land was recorded among the land records of the City of Alexandria in 1981. That decision, now twenty years old, is no longer open to revision if it ever was.[3]

Since 1971, the Intervenors have relied in good faith upon the validity of the Exchange Agreement and their right to develop the Potomac Greens site. RF&P and its predecessor have expended millions of dollars in predevelopment expenses. DIPS, on the other hand, did nothing but sit on its rights.

The purpose of the laches doctrine is to prevent just the sort of result that the lower court would permit. The Court of Appeals' holding that laches will not apply -- no matter the length of an inexcusable delay or the extent of prejudice to defendants so long as the plaintiffs can still obtain the relief they seek -- will undermine entirely the laches doctrine. The Court of Appeals' decision will encourage plaintiffs to "lie in the weeds" while the United States or a private party proceeds with complex plans at enormous expense. Public benefit will thus stand hostage to raid by litigation at whatever time the challenged project may be financially, politically or otherwise vulnerable. The resulting semi-paralysis serves no general aim. Indeed, it will encourage the government and private parties to move forward slowly and defensively because no matter how much time elapses and how much effort has been expended, laches will never be a bar.

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[3]The District Court's laches ruling was not directed at approval of the interchange design, which will be subject to further review on remand.

As applied to this case, the Court of Appeals' decision is clearly unfair as well as at variance with all other circuits which have considered similar questions. The detrimental reliance of NPS and Intervenors and the inexcusable delay by DIPS, make plain that it is inequitable to permit the validity of the Exchange Agreement to be litigated at this late date.

CONCLUSION

For these reasons, Petitioners respectfully request that this Court issue a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit in order that the decision of that Court regarding laches may be reversed.

Respectfully submitted,

Thomas F. Farrell, II
(Counsel of Record)
John S. Stump
Amy T. Holt
McGUIRE, WOODS, BATTLE
& BOOTHE
1199 North Fairfax Street
Post Office Box 25047
Alexandria, Virginia 22313-5047
(703) 739-6200

Date: May 3, 1991

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 86-2396

April 11, 1989

DAINGERFIELD ISLAND PROTECTIVE SOCIETY, et al.,

Plaintiffs-Appellants,

v.

DONALD P. HODEL, Secretary, U.S. Department of Interior, et al.,

Defendants-Appellees.

Before:

John H. Pratt, *District Judge.*

MEMORANDUM OPINION

Three citizens groups, Daingerfield Island Protective Society ("DIPS"), Save the George Washington Parkway, Northeast Citizens Association, and three individuals

bring this action against the Secretary and Assistant Secretary of the United States Department of Interior ("the Secretary"), certain named officials of the National Park Service, and the National Capital Planning Commission. Plaintiffs seek to set aside a 1970 Land Exchange Agreement, under which the United States Government acquired title to certain wetlands, known as Dyke Marsh located along the shores of the Potomac River between Alexandria and Mount Vernon, in exchange for granting the former owner of the wetlands an easement over the George Washington Memorial Parkway near Daingerfield Island to construct an interchange providing access to and from a parcel of land referred to as Potomac Greens. Plaintiffs also seek to void the approval of the interchange design granted by the National Park Service in 1981 and the National Capital Planning Commission in 1983. On November 26, 1986, Richmond, Fredericksburg and Potomac Railroad Company ("RF & P"), the owner of Potomac Greens, and Potomac Greens Associates Partnership were granted leave to intervene as defendants.

Plaintiffs contend that the departmental decisions that led to the execution of the Exchange Agreement and approval of the interchange violate the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, as well as numerous other statutes.

Background

On June 5, 1970, Secretary of the Interior Walter Hickel signed a Land Exchange Agreement (hereinafter sometimes "Exchange Agreement"), under which the United States would receive title to a 28.8-acre tract of

land known as Dyke Marsh[1] in exchange for an easement over the George Washington Memorial Parkway near Daingerfield Island to construct a traffic interchange.[2] As stated previously, the traffic interchange is intended to provide access over the George Washington Parkway to a 38.5-acre parcel of land referred to as Potomac Greens (or Potomac Center) located across the Parkway from Daingerfield Island.[3]

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[1] Dyke Marsh is located on the western shore of the Potomac River in Fairfax County, Virginia.

[2] The Fairchilds, Fairchild & Company, RF & P and the United States were parties to the Exchange Agreement. RF & P, which also owned the nearby railroad yards, contemporaneously with the execution of the Exchange Agreement, executed a long-term lease of this property to Fairchild & Company to develop this property. The ultimate purpose of plaintiffs is to prevent the development of this 38.5-acre parcel.

[3] The Exchange Agreement specifically provides that:

> [t]he United States will deed, grant, and/or issue such easements or other interests in land of the United States as may be necessary to establish adequate perpetual access to ingress and egress from the Parkway to the Potomac Center tract. . . .

Exchange Agreement ¶1, Admin.Rec. at Tab 22.

The Exchange Agreement further provides that:

> this agreement to exchange shall become effective upon execution by all of the parties hereto and delivery to the United States of America and its assigns of a proper deed of

One year later, on June 6, 1971, the other parties to the agreement, RF & P and Fairchild & Company, Inc. (hereinafter "Fairchild"), the leasee of RF & P, executed the Exchange Agreement. *See* Exchange Agreement, Admin.Rec. Tab 22 at 107-08; Federal Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment ("Federal Defendants' Motion to Dismiss") at 10.

Pursuant to the Agreement, the United States obtained title to Dyke Marsh by Warranty Deed dated June 30, 1971. *See* Warranty Deed, Admin.Rec. at Tab 30.[4]

> conveyance to Dyke's Marsh . . . . It is likewise agreed that the delivery of such deed by Fairchild to the United States shall entitle Fairchild and the railroad [RF & P], their successors or assigns . . . to the deed, grant and/or issuance of such necessary rights for access as stated herein from the United States. . . .

Id. ¶ 12. Moreover, the parties agreed that:

> all plans for the construction of the bridge and related approaches, ramps, and connections are to be approved by the National Park Service, the National Capital Planning Commission, and the Fine Arts Commission. . . .

Id. ¶ 11.

[4] The United States, although at all times obligated since the execution of the Exchange Agreement in 1971, did not convey a deed of easement granting right of access over the Parkway to RF & P until August 1984. *See* Admin.Rec. at Tab 159.

Environmental Reviews

There have been numerous environmental reviews over the past nearly two decades. On May 13, 1970, prior to the approval of the land exchange by the Secretary of Interior, the Associate Director for Professional Services of the National Park Service prepared a memorandum entitled "Environmental Factors, Dyke Marsh-Potomac Center Project," which concluded:

> there would be minimal adverse environmental import [sic] by reason of granting access to the George Washington Memorial Parkway, and there would be some environmental benefits by reason of Federal ownership of an additional portion of Dyke Marsh.
>
> The proposed agreement is in the public interest and should be concluded.

Admin.Rec. Tab 21 at 97.

In 1976, the National Capital Region of the National Park Service prepared a draft environmental assessment regarding granting the access rights over the Parkway. *See* "Potomac Center Access, Environmental Assessment, Mount Vernon Memorial Parkway" (August 1976), Admin.Rec. at Tab 55. After reviewing aesthetic and traffic considerations of various alternative approaches[5] to

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[5] The two basic alternatives were a) granting access to the Parkway to serve the proposed Potomac Center, and b) not granting access to the Parkway, with the existing access to Daingerfield Island to be maintained

granting the access rights, this environmental assessment concluded that conveying access rights to the Parkway from Potomac Center would have a detrimental environmental impact and that the access rights should not be granted. *See id.*, Tab 55 at 492. This 1976 environmental assessment was never adopted as final, however, because the National Capital Region was informed by its counsel that, under the Exchange Agreement, it was bound by the terms of the Exchange and could not refuse to convey access rights to the developer. *See* Admin.Rec. at Tabs 54, 58. The 1976 environmental assessment thereafter became a working paper for the Regional Director's recommendation that the access rights be purchased back from the developer. *See* Admin.Rec. at Tab 58. However, the National Park Service never adopted the Regional Director's recommendation that the access rights be repurchased for the likely reason that funds were not available.

In 1978, two of the plaintiffs in the instant proceeding, DIPS and Kenneth Williams, brought suit against the Department of Interior seeking to enjoin the Department from considering approving the interchange design of the access over the Parkway until an Environmental Impact Statement had been prepared. The District Court dismissed the case as premature because the National Park Service had not acted upon any proposal for the interchange design. *See Daingerfield Island Protective Society v. Andrus,* 458 F. Supp. 961

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and the Potomac Center not built. Additional alternatives included considering the effects of various levels of development of the Potomac Center tract as well as constructing the Potomac Center without access to the Parkway. *See* Admin.Rec, Tab 57 at 485.

(D.D.C. 1978). Plaintiffs did not challenge the validity of the Exchange Agreement which at the time had been in existence for seven years.

On April 13, 1981 the National Park Service approved the traffic interchange design. *See* Admin.Rec., Tab 115 at 775. The Park Service retained the right to make additional changes to the project, noting that RF & P still needed specific construction permits before it could begin work on the interchange. *See* Admin.Rec. at Tabs 68, 124.

In October of 1983 the National Park Service completed an environmental assessment ("EA") of the design of the proposed interchange. *See* "Environmental/Design Assessment, Crossing of George Washington Memorial Parkway at Daingerfield Island" (October 1983), Admin.Rec. at Tab 148. Because it was believed that the Park Service was legally obligated under the Exchange Agreement to grant the access rights, the EA did not consider the alternative of not granting the access rights. *See id.*, Tab 148 at 806.

The Commission of Fine Arts had previously approved the design of the proposed interchange on April 19, 1983, *see* Admin.Rec. at Tab 131;[6] the National Capital Planning Commission approved the interchange on November 3, 1983, *see* Admin.Rec. at Tab 153.

In 1982, the Fairchilds sued to rescind the Exchange Agreement for lack of consideration. After this suit was dismissed on jurisdictional grounds, the Fourth Circuit

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[6] Plaintiffs do not challenge the Commission of Fine Arts' approval of the interchange.

Court of Appeals reversed. Upon remand, Judge Bryan of the United States District Court, in a lengthy opinion, denied the Fairchilds' claim to rescind, holding that "the railroad would be prejudiced if rescission were granted, in light of the delay caused by plaintiffs' [Fairchilds'] conduct". *Fairchild v. United States*, No. 82-71-A, slip op. at 14 (E.D. Va. June 4, 1984) *aff'd*, No. 84-1854, slip op. (4th Cir. Aug. 22, 1985). In reaching his decision, Judge Bryan of necessity had to assume the continuing validity of the Exchange Agreement then almost thirteen (13) years old.

In August of 1984, the United States conveyed to RF & P[7] a deed of easement, which granted the railroad a perpetual easement across the parkway. *See* Admin.Rec. at Tab 159. No construction permits have been approved for the interchange.

Present Posture

On August 27, 1986, plaintiffs in a lengthy complaint (later amended on February 20, 1987) commenced the instant action. They allege that the Secretary's approval

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[7] The deed was conveyed to RF & P rather than Fairchild, the former owner of Dyke Marsh, because RF & P had terminated Fairchild's lease of the Potomac Center tract in January of 1982, and RF & P had assumed all rights granted to Fairchild. *See* Admin.Rec. at Tab 118. The lease was terminated because of Fairchild's failure to obtain the necessary site plan approval, rezoning and building permits to complete approval by a scheduled date and to contract for access bridge ramps and connections. Under the terms of the lease, RF & P succeeded to the rights of Fairchild.

of the Land Exchange Agreement in June of 1970 and the National Park Service's subsequent approval of the interchange design in 1981 violate the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*; the National Capital Planning Act, 40 U.S.C. § 71 *et seq.*; the Capper-Cramton Act, 46 Stat. 482; the Mount Vernon Highway Act, 45 Stat. 721; the National Park Service Organic Act, 16 U.S.C. § 1 *et seq.*; the Land and Water Conservation Fund Act, 16 U.S.C. § 460*l*-22(b); the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*; and Executive Order No. 11,988 concerning floodplain areas.

The Position of Defendants

Defendants raise three threshold defenses against plaintiffs' claims.[8] First and foremost, they assert that

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[8] The Intervenor Defendants additionally assert that DIPS lacks standing to challenge the National Park Service's approval of the interchange design because it failed to allege an injury causally related to the challenged action. *See* Intervenors' Memorandum in Support of Motion to Dismiss or for Summary Judgment ("Intervenors' Brief") at 25-29. DIPS has alleged that its members live within a mile or two of the easement and the Potomac Greens site, travel on the Parkway over which the easement was granted with great frequency, and use Daingerfield Island for recreation. *See* Amended Complaint ¶¶ 4-7, 12-15. These allegations comport with the standard set forth in *Sierra Club v. Morton*, 405 U.S. 727, 738, 92 S.Ct. 1361, 1367, 31 L.Ed.2d 636 (1972) (stating that standing can be grounded on aesthetic and environmental wellbeing). We find that the allegations

plaintiffs' claims are barred by the doctrine of laches. Second, defendants argue that those counts[9] of the Amended Complaint asserting violations of the Land and Water Fund Conservation Act, the National Park Service Organic Act, the Mount Vernon Memorial Highway Act, the Capper-Cramton Act, the National Capital Planning Act, and Executive Order No. 11,988 cannot be enforced by plaintiffs because none of these statutes or the Executive Order give rise to a private cause of action. Finally, they argue that count I of the Complaint (violations of NEPA) is moot since Congress enacted legislation requiring the Park Service to prepare an EIS

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are sufficient to establish that the members' use and enjoyment of Daingerfield Island, the Parkway and the streets on which they reside are likely to be injured by the agency's approval of the interchange design. We conclude that DIPS' alleged injury is traceable to the challenged action, that a favorable decision would likely provide redress, and that DIPS therefore has standing to pursue this claim. *See International Union of Bricklayers v. Meese,* 761 F.2d 798, 802 (D.C. Cir. 1985).

[9] The Federal defendants argue that counts III (Mount Vernon Highway Act and Capper-Cramton Act), V (National Capital Planning Act), VII (National Capital Planning Act), and VIII (Executive Order No. 11,988 and Floodplain Management Guidelines of the United States Water Resources Council) cannot be enforced by plaintiffs. *See* Federal Defendants' Motion to Dismiss at 23-29. The Intervenor Defendants join in these arguments and additionally assert that count II (Land and Water Conservation Fund Act) cannot be enforced by plaintiffs. *See* Intervenors' Brief at 15-25.

on the traffic impact of the Potomac Greens development.

A. *The Defense of Laches*

Defendants assert that plaintiffs' challenges to the Secretary's 1970 approval of the Land Exchange Agreement and the National Park Service's 1981 approval of the interchange design are barred by laches, plaintiffs' complaint having been filed 16 and 5 years after the challenged actions respectively. Although laches is a disfavored defense in environmental suits, *see Coalition on Sensible Transportation, Inc. v. Dole,* 642 F. Supp. 573, 588 n. 5 (D.D.C. 1986), it is nevertheless well settled that, under the appropriate circumstances, this equitable doctrine applies to environmental litigation. *See, e.g., Ecology Center of Louisiana, Inc. v. Coleman,* 515 F.2d 860, 867 (5th Cir. 1975), *Peshlakai v. Duncan,* 476 F. Supp. 1247, 1256 (D.D.C. 1979). As with other types of litigation, the party asserting a laches defense bears the burden of proving 1) unreasonable delay by the plaintiffs in asserting a claim, and 2) undue prejudice as a result of the delay. *Id.*

Furthermore, for the purpose of this discussion, we confine the defendants' assertion of laches as going to the plaintiffs' failure to challenge the Land Exchange Agreement for over fifteen years. We reserve for separate consideration that aspect of plaintiffs' complaint which challenges the approval of the interchange design.

1. Unreasonable delay

Plaintiffs challenge the agency action consisting of the Secretary's approval of the Land Exchange Agreement in which the United States acquired 28.5

acres of wetlands destined for development in return for a right of access over the Parkway. Plaintiffs argue that the Land Exchange Agreement is invalid because the Secretary failed to comply with various statutory requirements *prior to approving the land exchange.*[10] Thus, plaintiffs' complaint was filed 16 years after the Secretary's approval of the land exchange and 15 years after the Exchange Agreement, which plaintiffs now seek to have invalidated, took effect.[11]

We have no difficulty in concluding that plaintiffs' 16-year delay in bringing their claims challenging the validity of the Exchange Agreement was clearly excessive.

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[10] In considering the defense of laches, we must point out that the Land Exchange Agreement was, in fact, entered into more than 15 years ago and, despite this fact, the plaintiffs waited until 1986 before challenging this Agreement. It is undisputed that plaintiffs were at all times upon notice of this fact from the extensive press coverage in the Alexandria and Washington media.

[11] Plaintiffs acknowledge that the land exchange was first approved by the Secretary in June of 1970. Plaintiffs' Memorandum at 1. That the railroad did not obtain a deed of easement over the Parkway until 1984 is of no consequence to plaintiffs' challenge to the Land Exchange Agreement itself since it is the *approval* of the land exchange, which unquestionably took place in June of 1970, to which plaintiff objects. Additionally, by its terms, the Exchange Agreement became effective in 1971 when it was executed by all the parties and when the Dyke Marsh was conveyed to the United States. *See* Exchange Agreement ¶ 12, Admin.Rec. at Tab 22.

Whether a delay in bringing suit is unreasonable also depends on a number of additional factors, including whether the plaintiff has expressed early opposition to the challenged agency action, the nature of the agency's response, and the extent of actions, such as preparatory construction, that tend to motivate citizens to investigate legal bases for challenging the agency action. *See Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 854 (9th Cir.1982). All of these add up to excuses offered by plaintiffs for their inaction.

Plaintiffs do not contend that they were unaware of the Secretary's approval of the land exchange.[12] Rather, they argue that the 16 year delay in asserting their challenge to the Exchange Agreement should be excused because the United States did not convey an easement over the Parkway until 1984 and that, for a number of years, the Regional Director of the National Park Service recommended that the easement be repurchased. We note that only one plaintiff, Northeast Citizens Association, voiced opposition to the land exchange itself prior to instituting the instant suit.[13] We find this excuse to be without merit.

The record reflects that beginning in 1976, the Regional Director of the National Park Service

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[12] Plaintiffs made known their opposition to the granting of access rights over the Parkway as early as 1970.

[13] Plaintiff Northeast Citizens Association alone protested the land exchange and requested hearings in 1970, before Secretary Hickel signed the Exchange Agreement. *See* Amended Complaint, Ex. G.

recommended that the access rights be repurchased. *See* Admin.Rec. at Tabs 56, 162. However, the National Park Service never adopted this recommendation. At the same time, the Service made efforts to obtain more concrete plans for the proposed Potomac Center development and interchange in order to facilitate review of the construction plan and minimize the environmental impact before approving the access rights in 1984. *See* Admin.Rec. at Tabs 67, 69, 70, 77, 80, 92, 93.

Although it is clear that the Park Service considered repurchasing the access rights, the record also demonstrates that the Park Service, nevertheless, at all times, treated the Agreement as binding. The fact that the Park Service considered, among its various options, repurchasing the access rights provides no excuse for plaintiffs' 15-year delay in challenging the validity of the Agreement. In delaying instituting action on the Agreement, plaintiffs ran the risk that the agency ultimately would not approve repurchasing the access rights. This is, in fact, exactly what occurred in the instant case. The mere hope that the agency would someday repurchase the access rights that the agency bound itself to convey as early as 1971, is not sufficient justification for plaintiffs' failure to act.

It is also of no help to plaintiffs that an action brought by two of the plaintiffs now before us in 1978 was held to be premature. As previously mentioned, that suit, decided by Judge Gasch of this Court, did not challenge the validity of the Exchange Agreement itself. Rather that proceeding sought only to enjoin the defendants from acting on an *application for approval of construction plans for the traffic interchange* until the defendants complied with the procedural requirements of NEPA. That action did not seek to have the Agreement

itself invalidated. That issue was ripe for judicial review at that time, since the approval took place in 1970. Instead, plaintiffs slept on their rights and chose not to press their claims regarding the validity of the Exchange Agreement until 1986, 16 years after the agency action which they now challenge.

2. Undue prejudice

Plaintiffs argue that setting aside the Exchange Agreement at this late date would still be efficacious, since no construction activities on the interchange have begun and the natural environment in that area remains undisturbed. However, plaintiffs completely ignore the other half of the Exchange Agreement: the United States acquisition of ownership of Dyke Marsh. Even though there has been no preparatory construction on the site of the traffic interchange, we cannot overlook or turn our back to the environmental importance of the wetlands having been placed under government ownership since 1971. It is singularly ironic that plaintiffs dedicated to the preservation of environmental values should pay no attention to these factors.

Dyke Marsh is a particularly delicate wetlands area, the development of which would have been environmentally disastrous. *See* Admin.Rec. at Tab 21. These wetlands have become an integral part of the National Park System which the public has been able to enjoy for almost 20 years. Their acquisition protected the environmental integrity of over 400 acres of abutting wetlands already owned by the United States. Setting aside the Exchange Agreement at this late date would terminate a right the public has enjoyed for almost a decade: the right to continued enjoyment of the wetlands in their pristine state. "Laches does serve other

purposes collaterally, if not directly, including minimizing the disruption and expense caused by granting certain relief." *Powell v. Zuckert,* 366 F.2d 634, 638 (D.C.Cir. 1966).

Additional factors to be weighed in determining the existence of undue prejudice include the level of time and resources already committed to a project by the defendants and the degree to which project construction has progressed. Although we do not view this time and expense standing alone or the degree of development at the interchange site[14] to rise to the requisite level of prejudice that would justify application of the laches doctrine, we do conclude that they in combination with the prejudice to the public that would ensue from depriving the public of the continued enjoyment of the wetlands constitutes sufficient prejudice to the government to invoke the defense of laches.

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[14] The Federal defendants argue that "considerable," although unspecified, sums have been spent by the government in negotiating the original Exchange Agreement and in carrying out its obligations under the Agreement, including commissioning numerous traffic reports and environmental studies. In addition, the Intervenor defendants estimate that more than 2.5 million has been expended in development costs in reliance on the validity of the Exchange Agreement and approval of the interchange design. As stated previously, construction on the project has not begun; the National Park Service is presently precluded from approving any construction permit before the congressionally mandated EIS is prepared and reviewed.

We accordingly hold that this doctrine of repose is especially applicable to the facts herein and that plaintiffs are barred by laches from presenting their challenge to the validity of the Exchange Agreement.[15]

B. *The Issue of Mootness*

Entirely apart from plaintiffs' challenge to the Land Exchange Agreement, which we preclude on grounds of laches, there remains the separate issue of the approval by the National Park Service in 1981 of the interchange design. Plaintiffs claim that this approval violated NEPA because no EA or EIS was prepared and no public participation or interagency consultation occurred prior to said approval. Plaintiffs further seek to have this Court order the Park Service to prepare an EIS or a supplemental EA on the entire transaction including the interchange design.

On December 21, 1987, Congress enacted legislation[16] requiring the National Park Service to prepare an EIS for the Potomac Greens site. The Act precludes the Park Service from awarding a construction permit for the Potomac Greens interchange until it has prepared an EIS that reviews:

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[15] In view of this disposition, it is not necessary to decide the claims asserted in Counts II, III, IV, V, VII and VIII. Defendants contend that the statutes and Executive Order on which these claims rest do not provide for a private cause of action. Defendants' position is not without substantial merit.

[16] *See* Continuing Appropriations Act, H.J. Res. 395, 100th Cong., 1st Sess., 133 Cong. Rec. 12,458 (1987).

> the traffic impact of *only* the proposed 38-acre development opposite Daingerfield Island west of the George Washington Memorial Parkway . . . [and] *the impact* of the planned development on the visual, recreational and historical integrity of the Parkway. *Id.* (Emphasis supplied.)

The Act further states:

> The [EIS] shall also provide an evaluation of the alternative acquisition strategies to include but not be limited to appraisal estimates for the access rights, the entire 38-acre parcel, that portion of the 38-acre parcel as defined approximately by the historic boundary line, and any other recommendations by the Park Service to mitigate the Parkway degradation effects of the proposed development so as to adequately protect and preserve the Parkway.

Of critical importance is the provision of the legislation which reads:

> The National Park Service *solely* shall determine the legal and factual sufficiency of the [EIS] and its compliance with the National Environmental Policy Act of 1969.
>
> The [EIS] shall be *separate from, independent of, and in no way intended to affect or modify any pending litigation.* Notwithstanding any other provision of law, *no court shall have jurisdiction to consider questions respecting the*

> *factual and legal sufficiency of the [EIS] under the National Environmental Policy Act of 1969.*

Id. (Emphasis supplied.)

In summary, Congress has required the National Park Service to conduct a new EIS regardless of prior environmental reviews. This, of course, is the relief which plaintiffs seek from this Court. At the same time, the Act provided that this new EIS will be independent of and will not affect any pending litigation and that no court shall have jurisdiction to consider questions of the factual and legal sufficiency of the EIS under NEPA.

Based on the foregoing, plaintiffs now request that we stay consideration of Count I of the complaint pending completion of the EIS mandated by the legislation. Defendants, on the other hand, respond that this same legislation renders plaintiffs' claims under NEPA moot. We agree.

This is not the first time that pending litigation has been overtaken by subsequent litigation. In a similar case, Judge Parker of this Court dismissed a NEPA suit on the grounds of later-enacted Congressional legislation in *Friends of the Earth, Inc. v. Weinberger,* 562 F. Supp. 265 (D.D.C. 1983). There, the plaintiffs alleged that the Department of Defense had failed to comply with the National Environmental Policy Act in connection with a decision to seek congressional approval of a method of deployment of the MX missile system. *See id.* 562 F. Supp. at 266.

Subsequently, Congress, as part of a continuing appropriations resolution (just as here), established procedures to be followed by the President in

formulating a proposal for basing the missile systems and for an evaluation by the Congress. The government moved to dismiss on the ground that the legislation, termed the Jackson Amendment, precluded the necessity for review of the earlier-conducted environmental review. Judge Parker agreed, first ruling:

> Through the passage of legislation which governs the lawsuit, Congress can effectively moot a controversy notwithstanding its pendency before the courts.

Id. 562 F. Supp. at 270.

Here, Congress has required the National Park Service to conduct a new EIS regardless of the prior environmental reviews and has deprived this Court of further jurisdiction. In seeking a stay, plaintiffs have expressly taken the position that the congressionally-required EIS provides the relief they seek from this Court. That being the case, plaintiffs' motion, in effect, urges upon the Court that there is no longer any justiciable controversy for this Court to consider. The issue has been rendered moot. *See also Associated Third Class Mail Users v. United States Postal Service,* 662 F.2d 767 (D.C. Cir. 1980); *National Health Agencies' Committee for the Combined Federal Campaign v. Devine,* 564 F. Supp. 904 (D.D.C. 1983).

CONCLUSION

For the reasons set forth, the plaintiffs' claims which challenged the validity of the Land Exchange Agreement of 1971 are dismissed on grounds of laches. Plaintiffs' similar claim which questions the interchange design

approved by the National Park Service in 1981 is dismissed because it has been mooted by the Continuing Appropriations Act of 1987.

An Order consistent with the foregoing has been entered this day.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1989

No. 89-5165

DAINGERFIELD ISLAND PROTECTIVE SOCIETY, *et al.*,
Plaintiffs-Appellants,

v.

MANUEL LUJAN, JR., Secretary, U. S. Department of Interior, *et al.*,
Defendants-Appellees.

BEFORE: **Ruth B. Ginsburg, Williams and Sentelle, *Circuit Judges***

O R D E R

Upon consideration of appellees' motion for summary affirmance, federal appellees' motion for summary affirmance, appellants' response thereto and the replies, it is

ORDERED that the motions for summary affirmance be granted in part and denied in part. The district court's order of April 11, 1989 is affirmed to the extent that the decision dismissed as moot appellants' claims alleging violations of the National Environmental Policy Act ("NEPA"). *See Kremens v. Bartley*, 431 U.S. 119, 126-28 (1977). The motion is denied as to the remainder of the decision because the "merits of the parties' positions are not so clear as to justify summary action." *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

The Clerk is directed to withhold issuance of the mandate herein until resolution of the remainder of the appeal.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

Filed: December 29, 1989

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5165

Argued Oct. 19, 1990
Decided Nov. 30, 1990

DAINGERFIELD ISLAND PROTECTIVE SOCIETY, et al.,
Plaintiffs-Appellants,

v.

MANUEL LUJAN, JR., Secretary, Department of Interior, et al., and RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD COMPANY and POTOMAC GREENS ASSOCIATES PARTNERSHIP, Intervenors,
Defendants-Appellees.

Before:

WALD, *Chief Judge,*
MIKVA and RUTH BADER GINSBURG,
Circuit Judges.

Appeal from the United States District court for the District of Columbia.

Vacated, reversed and remanded.

Ronald J. Wilson, *for appellants.*
Mark E. Nagel, Asst. U. S. Atty., with whom Jay B. Stephens, U.S. Atty., John D. Bates and R. Craig Lawrence, Asst. U.S. Attys., were on the brief, *for federal appellees.*

Thomas J. Farrell, II, *for appellees,* Richmond, Fredericksburg and Potomac Railroad Co., et al.

RUTH BADER GINSBURG, *Circuit Judge*:

The origin of this case is a 1970 agreement ("Exchange Agreement") by which the National Park Service ("NPS," "the Service") completed its acquisition of Dyke Marsh, an environmentally sensitive wetland on the Potomac River between Alexandria and Mount Vernon, Virginia. In exchange for the wetland property it acquired, NPS granted developer Charles Fairchild & Co. an easement to build an interchange on the George Washington Memorial Parkway ("Parkway"). Fairchild hoped that this interchange would one day channel traffic to Potomac Greens, a mammoth office, hotel and residential complex he planned to build on land he leased from intervenor-appellee Richmond, Fredericksburg & Potomac Railroad Co. ("RF & P"). Twenty years later, Fairchild's hopes remained unrealized: no construction has begun on either the interchange or the Potomac Greens complex.

Daingerfield Island Protective Society and its coappellants (collectively, "the Society") commenced this action in 1986 to set aside the 1970 Exchange Agreement and to void the approval of the interchange design granted by NPS in 1981 and the National Capital

Planning Commission ("NCPC") in 1983. In response to defendants' motion for summary judgment, the district court dismissed the complaint in its entirety. The court declared moot all claims to void approval of the interchange design; and it rejected the attack on the 1970 Exchange Agreement on the ground of laches. *Daingerfield Island Protective Soc'y v. Hodel*, 710 F. Supp. 868, 377 (D.D.C. 1989).

In December 1989, we summarily affirmed the district court's decision to the extent that it dismissed as moot the Society's claim alleging violation of the National Environmental Policy Act of 1969 ("NEPA"). We now vacate the district court's mootness disposition to the extent that it covers counts of the complaint other than the NEPA claim; we also reverse the ruling on laches, and remand the case for further proceedings.

I.

In the years before the 1970 Exchange Agreement, Fairchild unsuccessfully pursued various development strategies on his Dyke Marsh property. He first planned in 1964 to construct highrise apartments, but failed to obtain the necessary rezoning. Admin.Rec. at Tab 17. The next year he sought permission to fill the marsh and to dredge canals for a "50-home Palm Beach type development." Admin.Rec. at Tab 97. Because the marsh is a vital habitat to wading and water birds and various other small animals, environmental groups joined area residents, who feared the effects of new development, to oppose Fairchild's plans. These groups pressed the government to acquire the entire Dyke Marsh area. By 1966, NPS owned most of the acreage. *Id.* Facing dimming prospects of development on his 28.8-acre Dyke Marsh tract, Fairchild turned his attention

to the 38-acre property across the Parkway that he leased from RF & P.

The 1970 Exchange Agreement provided that Fairchild would be entitled to Parkway access as soon as he deeded his Dyke Marsh property to the government. After delaying for more than a year, Fairchild conveyed a deed to the property in June 1971 and signed the Exchange Agreement on July 6, 1971. *Id.* at Tab 22. By its terms, the Agreement became effective on that date. The Agreement provided that Fairchild's construction could not commence until NPS, NCPC, and the Fine Arts Commission approved the design of the Parkway interchange; a paragraph of the Agreement, however, specified essential features of the design, and thus controlled the agencies' discretion. *Id.*

Fairchild did not submit construction plans for the interchange until 1975. *Id.* at Tab 41. His relations with NPS grew acrimonious, as the Service opposed Fairchild's complicated "reverse-flow" design. In 1976, after increased population and traffic had made NPS's limited 1970 environmental review obsolete, NPS ordered a full-scale environmental assessment of the interchange. *Id.* at Tabs 43, 54. The draft assessment, prepared by the National Capital Region of NPS, recommended that access be denied. 710 F. Supp. at 371. NPS's counsel, however, cautioned that Fairchild's right to Parkway access had vested in 1971, so that NPS could not simply refuse to grant access. *Id.* The National Capital Region of NPS then recommended repurchasing Fairchild's access rights. NPS did not adopt this recommendation, probably because it doubted that funds would be available for repurchase. *Id.*

In May 1978, the Society sought to enjoin the Department of Interior and NPS from approving any interchange design. In its prayer for relief, the Society did not demand that the Agreement be set aside, nor, except for a hint in Paragraph 22 of its 52 paragraph complaint, did it even allege that the 1970 Exchange Agreement was unlawful. Rather, the Society's attention trained on NPS's consideration of the interchange design. *See* Verified Complaint for Declaratory and Equitable Relief under the National Environmental Policy Act of 1969, *Daingerfield Island Protective Soc'y v. Andrus*, (D.D.C. 1978) (No. 78-0937). Because NPS had not yet acted on any proposed design, the district court dismissed the Society's challenge, without prejudice, as premature. *Daingerfield Island Protective Soc'y v. Andrus*, 458 F. Supp. 961 (D.D.C. 1978).

In April 1981, after Fairchild at last gave up on his "reverse-flow" plan, NPS approved the interchange design, reserving its right to make changes when Fairchild submitted more detailed plans. 710 F. Supp. at 371-72. NPS's October 1983 Environmental Assessment concluded that the design was satisfactory, noting that because of the terms of the 1970 Exchange Agreement, the Service could not recommend a "no build" alternative. *Id.* at 372. The Commission of Fine Arts approved the design in April 1983, as did NCPC in November 1983. NPS issued a deed for the easement in August 1984. Prior to these approvals in early 1982, RF & P had responded to Fairchild's delays by terminating his lease. The deed therefore went to RF & P as successor to Fairchild. *Id.* at 372 & n. 7.

In 1986, RF & P entered a joint venture with developer Savage/Fogarty Companies, Inc.; in late summer, Savage/Fogarty announced the joint venture's

plans to build a somewhat smaller Potomac Greens complex. Admin.Rec. at Tabs 169-70. The Society then commenced this action. The Society's complaint, filed in August 1986, alleges that when NPS approved the 1970 land exchange, the Service violated NEPA (Count I), the Land and Water Conservation Fund Act (Count II), the Mount Vernon Highway Act and the Capper-Cramton Act (Count III), the National Park Service Organic Act (Count IV), the National Capital Planning Act (Count V), the Administrative Procedure Act ("APA") (Count IV), and the National Historic Preservation Act (Count IX). The complaint also alleged the NPS's approval of the interchange design violated NEPA (Count I), the Mount Vernon Highway Act and the Capper-Cramton Act (Count III), the National Park Service Organic Act (Count IV), the National Capital Planning Act (Count V), the APA (Count VI), Executive Order 11988 and Floodplain Management Guidelines (Count VIII), and the National Historic Preservation Act (Count IX). Plaintiffs further charged that NCPC's approval of the interchange design violated the National Capital Planning Act (Count VII).[17]

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[17]For the statutes on which plaintiffs rely, see 42 U.S.C. § 4321 *et seq.* (NEPA); 16 U.S.C. § 4601-22(b) (Land and Water Conservation Fund Act); 45 Stat. 721 (Mount Vernon Memorial Highway Act); 46 Stat. 482 (Capper-Cramton Act); 16 U.S.C. § 1 *et seq.* (National Park Service Organic Act); 40 U.S.C. § 71 (National Capital Planning Act); 5 U.S.C. § 551 *et seq.* (APA); 16 U.S.C. § 470 *et seq.* (National Historic Preservation Act). For the Floodplain Management Guidelines, *see* 45 Fed.Reg. 35916 (May 28, 1980), *as revised at* 47 Fed.Reg. 36718 (August 23, 1982).

The federal defendants and supporting private intervenors,[18] raising threshold defenses, moved for dismissal or summary judgment. During the pendency of the motion, Congress acted. As part of its December 22, 1987 Continuing Appropriations Act ("CAA"), Congress directed NPS to prepare, within eighteen months, an Environmental Impact Statement ("EIS") concerning the effect that Potomac Greens would have on traffic and on "the visual, recreational and historical integrity of the Parkway."[19] The EIS was to evaluate "alternative acquisition strategies," including but not limited to the possibilities of acquiring RF & P's access rights, the portion of its 38-acre parcel lying within the Alexandria historical district, or the entire parcel. Congress further instructed NPS to investigate any other reasonable means by which the Parkway could be preserved. No construction permit for the interchange was to issue until the completed EIS had been reviewed by the "appropriate" congressional committees for 60 days. NPS was to be sole judge of "the legal and factual sufficiency of the [EIS] and its compliance with [NEPA]." Finally, Congress provided:

> The [EIS] shall be separate from, independent of, and in no way intended to

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[18]RF&P and Potomac Greens Associates Partnership were intervenors (usually referred to collectively as "RF & P"). Potomac Greens Associates Partnership is a joint venture of RF & P Development, Inc. (itself wholly owned by RF & P Corp.) and S/F Potomac Greens, Inc. (presumably a creation of Savage/Fogarty).

[19]Apparently, the EIS has not yet issued.

> affect or modify any pending litigation. Notwithstanding any other provision of law, no court shall have jurisdiction to consider questions respecting the factual and legal sufficiency of the [EIS] under [NEPA].

Pub. L. No. 100-202, 101 Stat. 1329-224 (1987).

The Society moved to stay consideration of its NEPA claim until the EIS issued. The district court denied that motion and granted defendants' motion for summary judgment, holding that all challenges to the 1981 and 1983 approvals of the interchange design were mooted by the CAA, and that all challenges to the 1970 Exchange Agreement were barred by laches. We summarily affirmed dismissal of the NEPA claim (Count I), and heard argument on the rest of the Society's appeal.

II.

"The burden of demonstrating mootness 'is a heavy one.'" *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 1383, 59 L. Ed. 2d 642 (1979) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 692, 632-33, 73 S. Ct. 894, 897, 97 L. Ed. 1303 (1953)). In this case, however, the federal appellees and RF & P endeavored to shoulder this burden only with respect to the Society's NEPA claim; they did not even argue that the Society's other challenges to the approval of the interchange design were moot. Indeed, federal appellees noted their agreement with the Society "that the other counts of the Complaint continue to be ripe for [district court] resolution." Federal Defendants' Opposition to Plaintiffs' Motion for Stay of Count I of the Complaint 4 n. *. Nevertheless, the district court ruled that the CAA had

mooted all of the Society's challenges to the interchange design approval.

The court's ruling, if we comprehend it correctly, rests on two considerations. First, the court understood plaintiffs to have made an encompassing concession. When the Society moved to hold its NEPA claim in abeyance, the court said, it admitted that an EIS, if actually prepared,

> provides the relief [plaintiffs] seek from this Court. That being the case, plaintiffs' motion, in effect, urges upon the Court that there is no longer *any* justiciable controversy for this Court to consider.

710 F. Supp. at 377 (emphasis added). The Society's motion, however, requested precisely and only that the court stay consideration of Count I, its NEPA claim. The Society maintained:

> The other counts of the complaint . . . are unaffected by the legislation, and The Society seeks expedited action on those counts. The legislation specifically states that the EIS "shall be separate from, independent of, and in no way intended to affect or modify any pending litigation."

Plaintiff's Motion for Stay of Count I of the Complaint 2, ¶ 4. In sum, the Society did *not* concede the mootness of its non-NEPA challenges to the interchange design approval; rather, the Society insisted that those claims remain vital.

Second, the district court may have read the 1987 CAA provisions as a withdrawal of jurisdiction over *any* challenge to the interchange design approval. *See* 710 F. Supp. at 376-77. But Congress commanded only that "no court shall have jurisdiction *to consider questions respecting the factual and legal sufficiency of the [EIS] under [NEPA]*"; it hardly follows that Congress intended to "deprive[] [the district court] of further jurisdiction" *simpliciter*. *Id*. Rather, "absent a clear statement to the contrary, legislation should not . . . be interpreted to oust a federal court's equitable power, or its jurisdiction over a present case." *Avery v. Secretary of Health & Human Servs.*, 762 F.2d 158, 163 (1st Cir. 1985). And in this case, as the Society observes, the CAA explicitly provides that the required EIS "shall be separate from, independent of, and in no way intended to affect or modify any pending litigation." Congress, we are obliged to conclude, did not intend to deprive the district court of "further jurisdiction" to hear the non-NEPA challenges to the interchange design approval.

The district court did not consider with particularity the impact of the CAA on each of the Society's various pleas for declaratory and injunctive relief under the Mount Vernon Highway Act, the Capper-Cramton Act, the National Park Service Organic Act, the APA, Executive Order 11988 and Floodplain Management Guidelines, the National Historic Preservation Act, and the National Capital Planning Act. Neither did the federal appellees, who view the Society's claims as if from a great distance:

> [The Society's] claims under the various statutes and Executive Order at bottom were that the Park Service had approved the design of the interchange without engaging in the public

> hearing and inter-agency review processes that [the Society] claims are mandated by those authorities. Its claims were thus quite similar to its NEPA claim, which alleged that no environmental assessment or EIS had been prepared with proper public participation.

Brief for Federal Appellees at 28-29. Federal appellees thus read the statutes and executive order as if each said, simply, "there shall be adequate public hearings and review," and they read the CAA as if it said, "No court shall entertain challenges to the Potomac Greens project grounded on inadequate public hearings or review." Yet the statutes, executive order, and guidelines on which the Society relies prescribe procedures and standards that have not been shown to be wholly reducible to those of either NEPA or the CAA. The CAA, it currently appears, has not given the Society all of the relief it sought in its non-NEPA challenges to the interchange approval.[20]

Closer, claim-specific analysis would be required before we could say that appellees have met the "heavy" burden of demonstrating mootness. *County of Los Angeles v. Davis*, 440 U.S. at 631, 99 S. Ct. at 1383. The

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[20]The Society sought a declaratory judgment that approval of the interchange violated the Mount Vernon Memorial Highway Act, the Capper-Cramton Act, the National Planning Act, the APA, Executive Order 11988 and guidelines implementing the Order, and the National Historic Preservation Act and guidelines. It further asked the court to order NPS to resubmit the interchange design to the National Capital Planning Commission, and to comply with Executive Order 11988 and guidelines.

vitality *vel non* of the non-NEPA claims was not briefed before the district court; therefore that court was not equipped to perform the requisite analysis. Accordingly, we vacate the district court's ruling that the Society's non-NEPA challenges to the interchange approval were mooted by the CAA, and we remand for further proceedings.[21]

III.

We turn next to the district court's dismissal, for untimeliness, of the attack on the 1970 Exchange Agreement. Laches, an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure, requires a showing of inexcusable delay and undue prejudice. *Both* must be shown; a finding of laches cannot rest simply on the length of delay. *See, e.g., Gull Airborne Instruments, Inc. v. Weinberger,* 694 F.2d 838, 843 (D.C. Cir. 1982). As the district court acknowledged, 710 F. Supp. at 373, laches is a disfavored defense in environmental suits. *See National Wildlife Fed'n v. Burford,* 835 F.2d 305, 318 (D.C. Cir. 1987). "Nearly every circuit . . . and numerous district courts have recognized the salutary

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[21]Appellees argue that the Society has abandoned Count III, waived relief on Count IV, and abandoned Counts V-VII and IX by failing to argue the merits in this court. They urge further that on Count VIII the Society should lose on the merits. The merits, however, were not ruled upon by the district court, and therefore will not be addressed by this court of review. The Society's brief, we note, makes clear that it continues to pursue each of its non-NEPA claims. *See* Brief by Appellants at 31-32 & n.35.

principle that '[l]aches must be invoked sparingly in environmental cases because ordinarily the plaintiff will not be the only victim of alleged environmental damage. A less grudging application of the doctrine might defeat Congress's environmental policy.'" *Park County Resource Council, Inc. v. United States Dep't of Agriculture*, 817 F.2d 609, 617 (10th Cir. 1987) (quoting *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 854 (9th Cir. 1982), and collecting cases from the First, Second, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits).

Because laches is an equitable doctrine, courts have generally held that it "is primarily addressed to the discretion of the trial court." *National Wildlife Fed'n*, 835 F.2d at 318. However, the district court's discretion is "confined by established standards." *Park County Resource Council*, 817 F.2d at 617; *see also Ecology Center of Louisiana, Inc. v. Coleman*, 515 F.2d 860, 867 n. 8 (5th Cir. 1975). A district court's ruling on laches does not qualify for deference if the court applied the wrong legal standard. *See Park County Resource Council*, 817 F.2d at 617. Several appellate decisions, reversing district court judgments, are illustrative. *See, e.g., id.; Preservation Coalition*, 667 F.2d at 851; *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774 (9th Cir. 180) (Kennedy, J.); *Cady v. Morton*, 527 F.2d 786 (9th Cir. 1975); *Ecology Center of Louisiana*, 515 F.2d at 860.

We have no cause to disturb the district court's finding that the Society's delay in bringing the suit was inexcusable.[22] We reverse the court's laches ruling,

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[22]The Society argues that its delay in opposing the exchange agreement should be measured from 1984, when NPS conveyed the easement deed to RF & P, or

nevertheless, on the ground that federal appellees and RF & P failed to demonstrate sufficient prejudice from the delay.

The district court expressly refused to rest its prejudice ruling solely on the amount of money that federal appellees, RF & P, and Potomac Greens spent in reliance on the 1970 Exchange Agreement.[23] On this

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1986, when RF & P formed its joint venture with Savage/Fogarty to develop the property. Appellants, particularly appellant Northeast Citizens Association, further argue that their vigor in opposing the Potomac Greens development as early as 1971 demonstrates that they did not sleep on their rights. We find decisive, however, the fact that the Society filed suit in 1978 to challenge the tentative interchange plans without (contrary to its current claim) challenging the Exchange Agreement. If, as the Society claims, the talk during 1976-84 of repurchasing Fairchild's access rights led it to believe that no challenge to the Exchange Agreement was necessary, why did it file suit in 1978 to challenge the interchange design plans, which presupposed the Agreement's validity?

[23]RF & P estimates, without indicating a source, that Fairchild spent about $1.6 million in attempting to develop the property. Much of that expenditure, however, is the result of Fairchild's insistence on a "reverse-flow" interchange until 1981, although the Exchange Agreement specified a different design. *See* Fairchild v. United States, No. 84-1452 (4th Cir. Aug. 22, 1985) (per curiam), *reprinted in* Joint Appendix at 377, 383. Thus we have no figure as to the amount Fairchild reasonably spent in reliance on the Agreement.

point, we are in accord with the district court. The documented expenditures of the three appellees, as far as we can tell, add up to less than $692,000.[24] This figure is quite modest, compared to other cases in which no dispositive prejudice was found. *See, e.g., Environmental Defense Fund v. Tennessee Valley Auth.*, 468 F.2d 1164 (6th Cir. 1972) ($29 million expended in reliance); *Park County Resource Council*, 817 F.2d at 609 ($1 million); *Coalition for Canyon Preservation*, 632 F.2d at 774 ($1 million); *Ecology Center of Louisiana*, 515 F.2d at 860 ($1 million).

Moreover, in environmental suits, the amount of money spent in reliance has not been considered the

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Moreover, neither Fairchild, now deceased, nor his company were ever party to this suit. We therefore do not include their expenditures in the total.

[24]As the district court noted, federal appellees never documented their expenditures, 710 F. Supp. at 375 n. 14. RF & P's estimated expenditures are difficult to determine. Its claim for $100,000 in salary expenses covers the years 1965 to November 1986, rather than the proper period of July 6, 1971 (the effective date of the Exchange Agreement) to August 27, 1986 (the day suit was filed). It claims additional expenditures of about $135,000, some of which, however, were for items that have independent value. *See* Affidavit of Urchie B. Ellis, Exh. A to Intervenors' Memorandum in Support of Motion to Dismiss or for Summary Judgment, at 7. Finally, Potomac Greens estimated its expenditures at about $457,000 as of the time the Society filed suit. *See* Attachment 2a to Intervenors' Memorandum in Support of Motion to Dismiss or for Summary Judgment.

prime factor in the prejudice inquiry. Two factors have been accorded heavier weight. The first is the percentage of estimated total expenditures disbursed at the time of suit. *See, e.g., Park County Resource Council*, 817 F.2d at 618. Here the estimated total expenditure are about $500 million, hence the amount disbursed so far is relatively insignificant. Second, courts have examined whether the relief plaintiffs seek is still practicable. This consideration -- the crucial one in the prior cases -- has turned on the degree to which construction is complete. *See Preservation Coalition*, 667 F.2d at 855 ("Delay may be prejudicial if substantial work has been completed before the suit was brought, but even substantial completion is sometimes insufficient to bar suit.") (emphasis deleted). *Compare, e.g., Coalition for Canyon Preservation*, 632 F.2d at 774 (no significant prejudice where right of way cleared, but road not built) *and Watershed Assocs. Rescue v. Alexander*, 586 F. Supp. 978 (D. Neb. 1982) (no significant prejudice; right of way cleared, but construction of levee not begun), *with Citizens & Landowners Against the Miles City/New Underwood Powerline v. Secretary, United States Dep't of Energy*, 683 F.2d 1171 (8th Cir. 1982) (prejudice found, since challenged power line nearly complete) *and National Parks & Conservation Ass'n v. Hodel*, 679 F. Supp. 49 (D.D.C. 1987) (prejudice found, since challenged restaurant on Daingerfield Island completed before suit filed). Here, not only has construction not begun, but a construction permit has not issued and cannot issue until Congress passes, if only silently, on the EIS that NPS is still preparing.

The district court expressly determined that appellees' expenditures and the extremely limited development so far carried out would not, taken together, "rise to the requisite level of prejudice that would justify

application of the laches doctrine." 710 F. Supp. at 375. Rather, the court rested its finding of prejudice on the environmental consequences of undoing the Exchange Agreement. The Dyke Marsh tract exchanged by Fairchild, the court observed, would revert to private hands, and this "would terminate a right the public has enjoyed for almost a decade: the right to continued enjoyment of the wetlands in their pristine state." *Id.* The district court stated that

> plaintiffs completely ignore the other half of the Exchange Agreement: the United States' acquisition of ownership of Dyke Marsh. Even though there has been no preparatory construction on the site of the traffic interchange, we cannot overlook or turn our back to the environmental importance of the wetlands having been placed under government ownership since 1971. It is singularly ironic that plaintiffs dedicated to the preservation of environmental values should pay no attention to these factors.

Id. In combination with the time and resources appellees spent in reliance on the Exchange Agreement, the court reasoned, the harm to the public and the environment would constitute sufficient prejudice to invoke the laches doctrine. *Id.*

The Society argues that the marsh was undevelopable even in 1970, so that no harm to the environment i
n fact would have occurred if the Exchange Agreement had never been concluded. We are not entirely persuaded by this argument. Federal appellees and intervenors have suggested, although not demonstrated,

that it was post-Agreement legislation protecting wetlands that made the marsh undevelopable.[25] And in any case, if the Dyke Marsh tract reverted to private hands, the public would stand to lose its right to use the land, even if no development took place.

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[25]Both further state without documentation that this legislation has cost RF & P the opportunity to develop the Dyke Marsh tract that it would have had if the Exchange Agreement had been promptly invalidated. We do not find it obvious that, as RF & P asserts without explanation, the Dyke Marsh land will be "returned" to it if the Agreement is invalid. We gather that RF & P relies upon the provision in the lease with Fairchild that gives the railroad "any and all right, title, and interest that [Fairchild], or its successors and assigns, may have or retain pursuant to the Exchange Agreement" if the lease is terminated. Admin.Rec., Tab 26 at 57. RF & P, then, could not even arguably invoke Fairchild's right to return of the land unless the Exchange Agreement were invalidated after January 31, 1982, when Fairchild defaulted and RF & P assumed his rights under the lease. *See* Admin.Rec. at Tab 118. Neither here nor in the district court, however, did RF & P indicate that the legislation preventing development became effective after that date. We therefore cannot accept the vaguely-stated contention that post-Exchange Agreement legislation has deprived RF & P of any opportunity it would have had to develop the Dyke Marsh tract. Moreover, since any claim that RF & P might have to the Dyke Marsh land presupposes an almost eleven-year delay in invalidating the Exchange Agreement, RF & P can hardly complain that it has been prejudiced in this respect by the Society's tardiness in challenging that Agreement.

We reverse the district court's laches ruling for a different reason. The court remarked that the Society had considered only one side of the environmental harm issue. The district court itself, however, similarly limited its consideration. The court was sensitive to the harm that might occur if the Dyke Marsh tract were to revert to private ownership, but it did not consider the environmental *benefit* that might result if the Exchange Agreement were voided and the Potomac Greens development blocked.

In principle, the court could have evaluated the public or environmental harms and benefits even-handedly if it had considered not just the harm of losing a portion of Dyke Marsh, but also the benefits that successful suit would bring. As a practical matter, however, the court could not have reliably estimated the environmental benefits of voiding the Exchange Agreement and stopping the Potomac Greens development without, in effect, writing its own EIS. We do not impose on the district court the task of rebalancing the environmental harms and benefits on remand. Laches is a doctrine that prevents courts from reaching the merits of a case; here, however, a fair application of the district court's balancing method would have required that court to do more than rule on the merits of plaintiffs' allegations -- it would have required the district judge to undertake the very action plaintiffs originally sought from NPS.

We thus return to the consideration precedent marks as crucial. In both of the briefs that the Society filed in this court, it contended that in every environmental case where a court grounded summary judgment on the defense of laches, the harm-generating activity plaintiffs

sought to prevent had already begun to occur, typically because construction of the project plaintiffs sought to block was underway. Since appellees had cited no contrary decision, nor had we discovered one in our own research, we asked federal appellees at oral argument whether one existed. They were unable to identify such a case.[26] Here, no construction has begun on the interchange or on the Potomac Greens complex; the damage that plaintiffs sought to prevent thus has not begun to occur. The defense of laches, we hold, must be rejected under the circumstances this case represents.

CONCLUSION

We vacate the district court's mootness dismissal of the Society's challenges to the 1981 and 1983 interchange design approvals, reverse its ruling that the Society's challenges to the 1970 Exchange Agreement were barred by laches, and remand for further proceedings consistent with this opinion.

It is so ordered.

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[26]Counsel for the federal appellees cited *Clark v. Volpe,* 461 F.2d 1266 (5th Cir. 1972). The first sentence of that opinion, however, states: "[P]laintiffs seek to enjoin the *construction, already in progress when suit was filed*, of Interstate Highway 610 through Park City in the City of New Orleans." *Id.* at 1266 (emphasis added).

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1990

No. 89-5165

DAINGERFIELD ISLAND PROTECTIVE SOCIETY, *et al.*,
Plaintiffs-Appellants,

v.

MANUEL LUJAN, JR., Secretary, U. S. Department of Interior, *et al.*,
Defendants-Appellees.

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, *Circuit Judges*

ORDER

Intervenors' Suggestion For Rehearing *En Banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Filed: January 30, 1991

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1990

No. 89-5165

DAINGERFIELD ISLAND PROTECTIVE SOCIETY, *et al.*,
Plaintiffs-Appellants,

v.

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Defendants-Appellees.

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, *Circuit Judges*

O R D E R

Upon consideration of intervenors' petition for rehearing, filed January 11, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Filed: February 4, 1991